Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

79-1181

LUIS HERNANDEZ, CHIC EDER
and JAMES EATON STAPLES,

Petitioners,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION AND APPENDIX

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OPINION BELOW

The opinion below is reported as Hernandez v. State, 369 So.2d 76 (Fla. 3d DCA 1979) cert. denied 378 So.2d 345 (Fla. 1979). The decisions of the District Court and the Supreme Court of Florida are set forth in the Appendix.

JURISDICTION

The jurisdictional requisites are set forth in the briefs of the petitioners.

QUESTIONS PRESENTED

I

WHETHER THE WARRANTLESS SEARCH OF A CLOSED, UNOCCUPIED TRUCK AND THE SEIZURE OF BALES OF MARIJUANA IN OPAQUE WRAPPING FOUND IN THE CARGO COMPARTMENT, BASED ON PROBABLE CAUSE AND IN EXIGENT CIRCUMSTANCES, VIOLATED THE FOURTH AMENDMENT?

II

WHETHER THE DECISIONS OF THIS COURT IN UNITED STATES v. CHAD-

WICK, 433 U.S. 1 (1977), AND ARKANSAS v. SANDERS, 439 U.S. 891, 99 S.Ct. 2586 (1979), HAVE RETROACTIVE APPLICATION TO AN OFFENSE COMMITTED PRIOR TO THEIR RENDITION?

STATEMENT OF THE CASE AND FACTS

The respondent accepts the statements of the case and the facts as set forth in the briefs of the petitioners and as supplemented by the opinion below.

ARGUMENT

I

THE WARRANTLESS SEARCH OF A CLOSED, UNOCCUPIED TRUCK AND THE SEIZURE OF BALES OF MARIJUANA IN OPAQUE WRAPPING FOUND IN THE CARGO COMPARTMENT, BASED ON PROBABLE CAUSE AND IN EXIGENT CIRCUMSTANCES, DID NOT VIOLATE THE FOURTH AMENDMENT.

As stated in Arkansas v. Sanders, 439 U.S. 891, 99 S.Ct. 2586, 2591, (1979),

> One of the curcumstances in which the Constitution does not require a search warrant is when the police stop an automobile

> on the street or highway because they have probable cause to believe it contains contraband or evidence of a crime. See United States v. Martinez-Fuerte, 428 U.S. 543, 561-562, 96 S.Ct. 3074, 3084-3085, 49 L.Ed.2d 1116 (1976); United States v. Ortiz, 422 U.S. 891, 896, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975); Texas v. White, 423 U.S. 67, 68, 96 S.Ct. 304, 305, 46 L.Ed.2d 209 (1975).

In the language of Chambers v. Maroney, 399 U.S. 42, (1970),

> automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. 399 U.S. 48

The Court restated the holding of Carroll v. United States, 267 U.S. 132, (1925):

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is sub-

> ject to seizure and destruction, the search and seizure are valid. U.S. at 149.
>
> * * *
>
> The right to search and the validity of this seizure are not dependent on the right to arrest. U.S. at 158.

Although Carroll dealty specifically with the stop and search of a vehicle in transit, Chambers dispells any motion that the vehicle need be actually moving; the crucial factor is that the vehicle is movable. 599 U.S. 51. The Court also stated that

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.
>
> 399 U.S. 52.

In determining the belief of the officers in Carroll, the Court looked to "the facts and circumstances within their knowledge, and of which they had reasonably trust-

worthy information." 399 U.S. at 162. This definition as well as other provisions of the Carroll opinion is statutory law in Florida.

The evidence adduced at the suppression hearing in the case sub judice established that the police officers who made the search and seizure in question had probable cuase. The facts are as set forth in the opinion of the District Court of Appeal of Florida, Third District, in Hernandez v. State, 369 So.2d 76 (Fla. 3d DCA 1979) wherein the court upheld the trial court's finding of probable cause:

> [On October 30, 1976,] two police officers recieved a radio dispatch that an unidentified caller saw several men unloading bales from a boat at night in the Miami River. When the officers saw nothing in the area, they radioed for more information and were given the location of the caller. They contacted the caller, who gave them no further information other than pointing to the general location of the activity he allegedly saw. The officers proceeded to the private property

> involved. It was an area where lobsters and fishing boats frequently unload. The officers parked their cars so as to block ingress and egress to and from the lot. With firearms drawn, they entered the property, saw a truck and heard a rustling noise in the surrounding bushes. Defendant Eder was seen near a moored boat backing into the water. As the officer approached him, Eder began to swim away. The officer returned to the back of the truck, looked inside through the rear door and saw bales of an unidentified substance enclosed in opaque material. One officer observed what he believed to be marijuana on the loading platform of the truck and thereafter cut open one bale to find a substance he recognized as marijuana.
>
> Another police officer later spotted three heads bodding in the river, one of whom he identified as Hernandez. Hernandez was not wearing a shirt, but a shirt was found aboard the boat on which the marijuana was seized. The officers seized the marijuana in the truck and on the boat.

The "unidentified caller" referred to by the District Court was a Mr. Herbert Hallowell, a resident of the area in which he saw the suspicious activity. The

essential elements of the information he gave the officers was corroborated, and it was the corroborating evidence, the officers' own observations, which gave rise to probable cause. Cf. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 399 U.S. 410 (1969). Draper v. United States, 358 U.S. 307 (1959); United States v. Carneglia, 468 F.2d 1084 (2d Cir. 1972). The officers found a truck in that location matching the description, and parked for loading thus corroborating the information given. There was no indication that the truck was incapable of being moved. Both officers heard noises indicating the presence of a number of persons in the darkenss, again corroborating the information that several men were doing the loading. The truck could have been driven away through the chain-link fence around the area. There clearly was probable cause to believe that truck

contained contraband and that the truck was movable. The situation was thus distinguishable from the facts of Coolidge v. New Hampshire, 403 U.S. 443, (1971), where there was no suggestion that the car was being used for any illegal purpose, and since it was regularly parked in the driveway of the defendant's house, the opportunity for search was not fleeting.

Another factor which can contribute to probable cause is the extent of the officers' knowledge of "public facts and geographical positions." Carroll v. United States, 267 U.S. at 160. Just as the agents in Carroll knew that the Detroit area was one of the most active centers in the country for smuggling bootleg whiskey, the officers in the case sub judice had general knowledge prior to the search that that area was used for marijuana smuggling. One officer had specific knowledge of a seizure of bales of

marijuana loaded in a truck. Neither officer had before seen a truck or a truck with a boat in the area in question.

An alternative or additional justification for opening the cargo door of the truck in this case is the fact that a serious threat to the officers' safety was presented. Where circumstances provide probable cause to believe a serious threat to safety exists, a cursory safety check is permitted, United States v. Cravero, 545 F.2d 406 (5th Cir. 1977), cert. denied 97 S.Ct. 1123; McGuhan v. Wainwright, 526 F.2d 397 (5th Cir. 1976); United States v. Looney, 481 F.2d 31 (5th Cir. 1973) cert. denied 414 U.S. 1070. The officers heard what sounded like people running near the truck. Their police dispatch had indicated more than one person was involved. Petitioner Eder took flight upon being commanded to stop. The officers were

reasonable in their belief in light of all the circumstances that the truck was occupied by someone possibly possessing a weapon. One officer testified that he was concerned for his safety and that of his partner in opening the truck. Therefore, the search was justified on safety grounds alone at least to the extent of opening the cargo door of the truck.

In light of the circumstances, the officers acted properly in searching the truck and the boat. The lawfulness of their actions must be considered on the basis of what they saw and the information they possessed, as stated in Carroll, without the benefit of hindsight. United States v. Wysocki, 457 F.2d 1155 (5th Cir. 1972) cert. denied 409 U.S. 859, 93 S.Ct 145, 34 L.Ed.2d 105.

Moreover, any attempt by the petitioners to characterize the bales of marijuana as containers, like luggage, from which an

expectation of privacy might be inferred from their appearance, must fail. One officer observed what he believed to be marijuana on the loading platform of the truck and noted the smell of hay or dried grass before he slit open one bale to sample its contents. There was therefore probable cause to support the seizure of the bales prior to the slitting of the one bale, based on plain view. Moreover, the contents of the marijuana bales was reasonably inferrable from their outward appearance in those circumstances, even though wrapped in opaque material. Albo v. State, 379 So.2d 648 (Fla. 1980). As stated in Note 13 to this Court's opinion in Arkansas v. Sanders, supra:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar stools or a gun case) by their very nature cannot support any reasonable ex-

pectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968)(per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

ARGUMENT

II

THE DECISION OF THIS COURT IN UNITED STATES v. CHADWICK, 433 U.S. 1 (1977), AND ARKANSAS v. SANDERS, 439 U.S. 891, 99 S.Ct. 2568 (1979) DO NOT HAVE RETROSPECTIVE APPLICATION TO AN OFFENSE COMMITTED PRIOR TO THEIR RENDITION.

Based upon the standards set forth by this Court in United States v. Peltier, 422

U.S. 531 (1975), the holdings of United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 439 U.S. 891, 99 S.Ct. 2586 (1979), may not be retroactively applied to the case at bar. At the time of the search and seizure in issue, October 30, 1976, neither Chadwick nor Sanders had been decided, and rule of law in Florida, the Fifth Circuit, and other circuits in effect at that time was that law enforcement officers could open containers found in motor vehicles so long as they had probable cause to believe the containers contained evidence or contraband, pursuant to the automobile exception to the warrant requirement under Carroll v. United States, 267 U.S. 132 (1925), and Chambers v. Maroney, 399 U.S. 42 (1970). United States v. Montgomery, 558 F.2d 311 (5th Cir. 1977); United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978); United States v. Redu, 563 F.2d 510 (2d Cir. 1977) cert. denied

435 U.S. 973 (1978); United States v. Barry, 571 F.2d 2 (7th Cir. 1978) cert. denied 439 U.S. 840 (1979); United States v. Stewart, 595 F.2d 500 (9th Cir. 1979); United States v. Ochs, 595 F.2d 1247 (2d Cir. 1979) cert. denied 48 N.S.L.W. 3172 (1979); United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975) cert. denied 423 U.S. 832 (1975). Therefore, at that time the police officers could have opened one of the bales of marijuana, which was wrapped in opaque material, found in the cargo compartment of the truck even if under Chadwick and Sanders the bales were now deemed a container, like a suitcase, which manifested a reasonable expectation of privacy.

CONCLUSION

For the foregoing reasons and authority, the petitions for Writ of Certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent in Opposition was furnished by mail to E. BARRETT PRETTYMAN, Esq., 815 Connecticut Avenue, N.W., Washington, D.C., 2006, and JOEL HIRSCHHORN, Esq., 742 N.W. 12th Avenue, Miami, Florida, 33136, this _____ day of April, 1980.

JAMES H. GREASON
Assistant Attorney General

A P P E N D I X

Luis HERNANDEZ, James Eaton Staples, and Chic Eder, Appellants,

v.

The STATE of Florida, Appellee.

Nos. 77-1682, 77-2412

District Court of Appeal of Florida, Third District.

Feb. 27, 1979.

Rehearing Denied April 16, 1979.

Defendants were convicted in the Circuit Court, Dade County, Ira L. Dubitsky, J., of possession of over 100 pounds of marijuana and they appealed. The District Court of Appeal held that: (1) the evidence was sufficient to show probable cause to search a truck and the area around it, and (2) the evidence was sufficient to sustain one defendant's conviction.

Affirmed.

Michael Kennedy and Paul Costeleiro, New York City, Jack Attias, Key Biscayne, Hirschhorn & Freeman and Joel Hirschhorn,

Miami, for appellants.

Jim Smith, Atty. Gen., and James H. Greason, Asst. Atty. Gen., for appellee.

Before HAVERFIELD, C.J., and PEARSON and BARKDULL, JJ.

PER CURIAM.

These appeals have been consolidated for appellate disposition because they grow out of the same factual situation. Chic Eder and James Eaton Staples appeal a judgment finding them guilty of possession of over one hundred pounds of marijuana, entered upon their plea of nolo contendere, reserving their right to appeal the trial court's order denying their motions to suppress evidence of the marijuana, which was found in a truck and over which they were alleged to have had knowledge and control. The defendant Luis Hernandez appeals a judgment finding him guilty of the same

crime. Hernandez was tried before a jury and found guilty.

Each of the defendants has a point urging error upon the trial court's denial of defendants' motion to suppress. For the determination of this question, it is necessary briefly to present the facts as revealed by the record. These facts will be set out in the light most favorable to the order of the trial judge. See Ponder v. State, 323 So.2d 296 (Fla. 3d DCA 1975); and Rodriguez v. State, 189 So.2d 656 (Fla. 3d DCA 1966).

Two police officers received a radio dispatch that an unidentified caller saw several men unloading bales from a boat at night in the Miami River. When the officers saw nothing in the area, they radioed for more information and were given the location of the caller. They contacted the caller, who gave them no

further information other than pointing to the general location of the activity he allegedly saw. The officers proceeded to the private property involved. It was an area where lobsters and fishing boats frequently unload. The officers parked their car so as to block ingress and egress to and from the lot. With firearms drawn they entered the property, saw a truck and heard a rustling noise in the surrounding bushes. Defendant Eder was seen near a moored boat backing into the water. As the officer approached him, Eder began to swim away. The officer returned to the back of the truck, looked inside through the rear door and saw bales of an unidentified substance enclosed in opaque material. One officer observed what he belived to be marijuana on the loading platform of the truck and thereafter cut open one bale to find a substance he recognized as marijuana.

Another police officer later spotted three heads bobbing in the river, one of whom he identified as Hernandez. Hernandez was not wearing a shirt, but a shirt was found aboard the boat on which the marijuana was seized. The officers seized the marijuana in the truck and on the boat.

We hold that the evidence is sufficient to show a probable cause to search the area and the truck which contained the contraband. We further hold that there was adequate, legally-sufficient evidence to withstand defendant Hernandez's motion for judgment of acquittal in that the evidence viewed in the light most favorable to the State shows a prima facie case. See Everett v. State, 339 So.2d 704 (Fla. 3d DCA 1976).

Defendant Hernandez urges, in addition to his claim that the evidence was insufficient, that he should be granted a new trial because a state requested instruc-

tion given by the court tended to place the burden on him of disproving his own guilt. We have examined the instruction to which objection was made and hold that it was properly given. See Selph v. State, 22 Fla. 537 (1886); and U.S. v. Llamas, 280 F.2d 392 (2d Cir. 1960).

Having examined the contentions of each appellant in the light of this record and finding no error, the judgments and sentences are affirmed.

Affirmed.

SUPREME COURT OF FLORIDA

WEDNESDAY, NOVEMBER 7, 1979

CASE NO. 56,664

District Court of Appeal,
Third District

77-1682
77-2412

LUIS HERNANDEZ, ET AL.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla.R.App.P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur.

ADKINS, ACTING C.J., Dissents
A True Copy
TEST:

Sid J. White
Clerk Supreme Court.
By: TANYA CARROLL, Deputy Clerk